No. 15709

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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TONY CAMPOS MEJIA,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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### Jurisdictional Statement.

The government accepts and incorporates herein appellant's Statement of Jurisdiction.

### Statement of Facts.

Defendant's arrest and conviction grew out of certain factual transactions occurring on February 20, 1957, which also involved Mejia's co-defendant, Peter Young and others.

The events of February 20, 1957 actually have their beginning on February 18, 1957 when Sergeant Algy F. Landry, a Deputy Sheriff of Los Angeles County, spoke to Peter Young over the telephone. On this occasion Mr. Young stated that Sergeant Landry could buy approxi-

mately 80 pounds of marijuana for $3500 [R. T.* p. 32, lines 21-24]. Early the next day, however, Mr. Young told Sergeant Landry that he could not make his "contact". Later that evening, Landry and Young agreed over the telephone to consummate the sale—80 pounds of marijuana for $3500—on the following day, February 20, 1957 [R. T. p. 32, line 24, to p. 33, line 10]. Accordingly, Sergeant Landry and Federal Narcotics Agent Malcolm P. Richards drove to Young's house at 1310 W. Olympic Boulevard to pick up the marijuana. The sale never took place, however, because Peter Young was arrested approximately ten minutes after Landry and Richards arrived [R. T. p. 24, line 17, to p. 25, line 6].

It was prior to and during Young's arrest that appellant Tony Mejia became involved in the narcotics transactions of February 20, 1957. On that date Deputy Sheriff Justin Burley, who was surveilling Peter Young's house on 1310 W. Olympic, with Federal Narcotics Agent Perry and Deputy Sheriff William L. Farrington, [R. T. p. 77, line 23, to p. 78, line 3], observed Young walking near the corner of Olympic and Blaine. Presently, Young was joined by another person, who remained with him for approximately fifteen or twenty minutes. After that amount of time had elapsed, this second person (who was never identified) was picked up by a 1955 blue Plymouth, license number CMF 088, which had been headed west on Olympic Boulevard [R. T. p. 78, lines 11-16]. Deputy Burley identified the driver of this automobile as appellant Tony Mejia [R. T. p. 79, lines 13-16]. The Plymouth then proceeded east on Olympic, turned into an alley, and stopped directly behind 1310 West Olympic (Young's

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*Reporter's Transcript hereinafter referred to as R. T.

residence) [R. T. p. 79, lines 3-12]. After waiting approximately thirty seconds, Deputy Burley, Deputy Farrington, and Agent Perry went into the alley after the Plymouth [R. T. p. 79, lines 17-21]. While hidden from view, these officers observed appellant Mejia's companion take a large cardboard box from the Plymouth, carry it into defendant Young's house, and return to Mejia's waiting automobile [R. T. p. 80, lines 7-10; p. 81, lines 18-21]. It was then that the officers drove up behind Mejia's Plymouth and saw appellant Mejia leaning over the front seat "as if to pick up something from the floor in the rear seat." Mejia and his companion spotted Deputy Burley and his fellow officers, however, and sped out of the alley to escape apprehension [R. T. p. 82, lines 4-20]. At this time defendant Peter Young was seen sprinting out the door of his house and down the street, where he fell and was taken into custody by other officers [p. 24, line 17, to p. 25, line 6; p. 83, lines 10-17]. Appellant Mejia and his companion did manage to escape, however. The box which appellant Mejia's companion delivered to Young's residence was recovered and the contents were later analyzed by Thomas Wieland, a forensic chemist, and found to be marijuana [R. T. p. 220, lines 6-14].

It was not until March 20, 1957 that Deputy Burley again saw appellant Mejia. On that occasion Mejia, who apparently did not recognize Burley, *told* the latter (whom he believed to be a narcotics buyer) that he had almost been arrested by narcotics officers on or about February 20, 1957 after he had delivered 80 pounds of marijuana to Peter Young [R. T. p. 86, lines 6-21]. On April 12, 1957 Mejia was arrested. Appellant was subsequently convicted of unlawfully receiving, concealing, and transporting marijuana in violation of 21 U. S. C. §176(a).

## Summary of Arguments.

I.

IT WAS NOT ERROR FOR THE COURT TO ORDER TWO DEFENDANTS, SEPARATELY INDICTED, TRIED TOGETHER WHERE THE OFFENSES CHARGED EMANATED FROM THE SAME ACTS OR TRANSACTIONS.

II.

THERE WAS NO ERROR IN THE COURT'S REFUSAL TO GRANT APPELLANT A NEW TRIAL BECAUSE ALL STEPS WERE TAKEN BY THE COURT TO PRECLUDE THE POSSIBILITY OF PREJUDICE RESULTING FROM THE CONSOLIDATION OF APPELLANT'S CASE WITH ANOTHER CLOSELY RELATED CASE.

III.

THE GOVERNMENT PRESENTED SUBSTANTIAL EVIDENCE FROM WHICH INFERENCES CONSISTENT WITH GUILT AND INCONSISTENT WITH INNOCENCE WERE PROPERLY DRAWN BY THE JURY.

## ARGUMENT.

### I.

### It Was Not Error for the Court to Order Two Defendants, Separately Indicted, Tried Together Where the Offenses Charged Emanated From the Same Acts or Transactions.

Appellant's position regarding consolidation of the indictments involved herein flies in the face of authority, both statutory and decisional. It is submitted that it is not necessary to look further than the Federal Rules of Criminal Procedure to answer appellant's charge of error in regard to his joinder with Peter Young. Rule 13 prescribes that

> "(t)he court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information." (Title 18, U. S. C. A.)

Therefore, it is necessary to determine if the offenses of Mejia and his codefendant, Young, could have initially been joined in a single indictment or information. The answer to this depends upon the provisions of Rule 8 and particularly upon Rule 8(b). [*Malatkofski v. United States,* 179 F. 2d 905 (1st Cir., 1950); *Cataneo v. United States,* 167 F. 2d 820 (4th Cir., 1948).] Rule 8(b) in material part says that

> ". . . (t)wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. *Such defendants may be charged in one or more counts together or*

> *separately and all of the defendants need not be charged in each count* (18 U. S. C. A., Rule 8(b))." (Emphasis added).

The instant case fits exactly within the provisions of Rule 8(b). Both appellant Mejia and Peter Young participated in the events surrounding the transportation and delivery of marijuana to Young's residence. There is little doubt that these events constitute a "series of acts or transactions" within the meaning of Rule 8(b). In *Cataneo v. United States,* 167 F. 2d 820 (4th Cir., 1948), the court quoted Justice Sutherland's classic definition in *Moore v. New York Cotton Exchange,* 270 U. S. 593, when it stated that

> "'(t)ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." (167 F. 2d 820, 823).

Can there be any doubt that Mejia's driving up behind Young's residence on February 20, 1957 where a large box of marijuana was unloaded has a logical relationship with Young's attempted sale of marijuana to Sergeant Landry and Agent Richards during the same hour on the same day? Moreover, the last sentence of Rule 8(b) precludes any serious claim of error in the instant case since it authorizes the consolidation of offenses where some of the counts are not common to all the defendants. In *Daley v. United States,* 231 F. 2d 123 (1st Cir., 1956), *cert. den.,* 351 U. S. 964, Judge Magruder succinctly states that

> ". . . (r)ule 8(b) on its face contemplates the situation where some of the evidence might be admissible against one defendant and not against a

> codefendant at a single trial, for in its concluding clause the rule provides that 'all of the defendants need not be charged in each count.'" (231 F. 2d 123, 125.)

In other words, the mere consolidation for trial of appellant Mejia and his codefendant, Young, did not prejudice appellant merely because some counts did not refer to him. Appellant's position seems to be the converse of this proposition when he states that

> "(i)t is error to try two defendants together where one is charged with only a minor fraction of the offenses the other is charged with, and where neither defendant knows of the other." (Ap. Br., *p. 1.)

If we dispense with appellant's unwarranted conclusions that his offense was only a "minor fraction" of those with which Young was charged and that neither defendant knew of the other (a fact which the jury had an opportunity to consider) the feeling of prejudice which appellant's brief seeks to arouse is quickly vitiated. It is, in the first place, debatable that one-fourth of the offenses Peter Young was charged with was a "minor fraction." In fact, it could be argued that this was a rather substantial fraction. There were not involved so many offenses in this case that Appellant Mejia's indictment was buried under a morass of material wholly irrelevant to the offense with which he was charged. His offense was clearly delineated in the indictment which was read to the jury by the court before any evidence was presented [R. T. pp. 5-8]. It was made quite clear that Tony Mejia was charged with one offense, and Peter Young was charged with four offenses. This was something the

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*Appellant's Brief hereinafter referred to as Ap. Br.

jury could certainly understand. The fact that some of the evidence used in the government's case against Young was not used against appellant is of little moment, especially in a case such as this where there were only a small number of offenses charged, and where only two defendants were tried together. In fact, in *Turner v. United States,* 222 F. 2d 926 (4th Cir., 1955), *cert. den.* 350 U. S. 831, where two defendants, separately indicted, were ordered tried together, the court of appeals said that

> ". . . (o)ne might almost say that it would have been an abuse of discretion to require separate trials as to the two defendants since it would have required unnecessary repetition of substantially the same evidence. See Fed. Rules of Crim. Procedure 8, 13, 18 U. S. C. A."

It is also universally held that questions of consolidation are within the sound discretion of the trial court. (*Turner v. United States,* 222 F. 2d 926, 932 (4th Cir., 1955), *cert. den.,* 350 U. S. 831; *United Sates v. Antonelli Fireworks,* 155 F. 2d 631, 635 (2d Cir., 1946), *cert. den.,* 329 U S. 742, *reh. den.* 329 U. S. 826).

A reading of the cases cited by appellant do not seem to sustain his position, either. In *Dunaway v. United States,* 205 F. 2d 23 (D. C. Cir., 1953), cited by appellant on page 2 of the appellant's brief, one defendant was charged in three separate indictments with house-breaking on three separate occasions at three different places. The indictments were consolidated for trial under Rules 13 and 8(a), and the appellant was acquitted of one offense

but convicted of the other two. In *Dunaway,* the convictions were affirmed with the passing comment that consolidation is usually a matter for the discretion of the trial court. *Schaffer v. United States,* 221 F. 2d 17 (5th Cir., 1955) from which appellant quotes on page three of the appellant's brief concerned a set of circumstances not present in the instant case. In the *Schaffer* case, Schaffer and one Devenny were tried together for the third time after two prior mistrials had been declared. Schaffer's confession was brought in with instructions not to use it against Devenny. The appellate court, in reversing the convictions, held that the cases should have been severed for trial because the two defendants were so inseparably connected in all the transactions involved that Shaffer's confession was undoubtedly used against Devenny in spite of any instruction the judge might have given. In the instant case there were no such circumstances.

It is therefore submitted that there cannot possibly be any error predicated upon the trial judge's order to consolidate the separate indictments involved in the instant case. The circumstances involved herein and the law applicable thereto almost completely preclude the possibility that there was any abuse of discretion on the part of the learned trial judge in this regard.

## II.

## There Was No Error in the Court's Refusal to Grant Appellant a New Trial Because All Steps Were Taken by the Court to Preclude the Possibility of Prejudice Resulting From the Consolidation of Appellant's Case With Another Closely Related Case.

This allegation of error is, of course, closely connected with appellant's allegation that the initial consolidation of Mejia's case with Young's was erroneous. It should be noted, once again, that the trial judge carefully pointed out to the jury that Appellant Mejia was charged with only *one* offense when he read the indictment to the jury before the introduction of any evidence. To further avoid the possibility of any confusion which might ensue as the trial progressed, the court further explained the indictment as follows:

> "You will notice that the date and the quantity of marijuana and the offense charged in Count 4 of the indictment against Peter Young is virtually the same in words and is the same in substance as the offense charged against Tony Campos Mejia and it appears to be the same in substance as the offense charged charged against Tony Campos Mejia in the other indictment. Upon representation of the Government that the same evidence would be offered as against both defendants as to each alleged transaction, the cases are being heard and tried together." [R. T. p. 8, lines 14-23].

And during the course of the trial it is difficult to imagine how or why the jury would decide to use evidence presented in the prosecution of Peter Young against Appellant Tony Mejia. The appellant was further protected by the judge's instructions to the jury after both

sides had rested. Lest they had forgotten his statements at the outset of the trial, he admonished them once again as follows:

> "As you have noted, a separate crime or offense is charged in each count of the indictment in the Young case and a single count in the indictment in Mejia case. Each offense and the evidence applicable thereto should be considered separately. The fact that you may find the accused guilty or not guilty of one of the offenses charged should not control your verdict with respect to any other offense charged." [R. T. p. 479, line 20, to p. 480, line 1].

We can, of course agree with appellant that when a defendant is prejudiced by consolidation with another defendant, a new trial should be granted, but it is difficult to see how appellant could have been prejudiced in view of the painstaking admonitions given by the trial judge to the jury. In *United States v. Haupt,* 136 F. 2d 661 (7th Cir., 1943) upon which appellant relies heavily, the number of defendants and the numerous overt acts alleged distinguish that case from the instant case in which there are only two codefendants. The *Haupt* case was further complicated by the fact that all the defendants were lumped into a single count indictment in which many overt acts were alleged, thus making it probable that the statements and acts of some defendants would be used against others, some of whom the government was not even certain were parties to the offense involved therein. Needless to say, the jury in the instant case was not confronted with such a complicated set of facts. In fact the same argument made under Section I, *supra,* that the small number of offenses charged almost precluded the possibility of confusion can be mentioned under this section as it is also relevant here. This fact, coupled with

the judge's admonitions and instructions, leave little ground upon which to predicate error from the court's refusal to grant appellant a new trial. Appellant was tried under standard procedures with all the safeguards guaranteed by our system of jurisprudence. He did not deserve a new trial.

## III.

## The Government Presented Substantial Evidence From Which Inferences Consistent With Guilt and Inconsistent With Innocence Were Properly Drawn by the Jury.

A reading of the record, or of the Statement of Facts included herein, will reveal that appellant's *conclusion* that there was no substantial evidence to support a conviction is without merit. Not only was Tony Mejia seen in his blue Plymouth picking up Peter Young's companion near Peter Young's residence on February 20 [R. T. p. 78, lines 11-16], but he was also positively identified in this same Plymouth automobile when it was parked behind Peter Young's house a few minutes later. It must be added, of course, that Mejia's unidentified passenger was observed carrying a large cardboard box into Young's house [R. T. p. 80, lines 7-10; p. 81, lines 18-21]. We must also note that the contents of this large cardboard box later proved to be marijuana [R. T. p. 220, lines 6-14]. This evidence alone is enough to support the jury's finding of guilt because

> "(t)he proof in a criminal case need not exclude all *possible* doubt. It need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt.'" (*Norwitt v. United States,* 195 F. 2d 127 (9th Cir., 1952), *cert. den.*, 344 U. S. 817).

There is, however, more evidence in the form of appellant's own admissions of guilt. On March 20, 1957, appellant told Deputy Burley, who was posing as a narcotics buyer, that he had narrowly escaped arrest after delivering marijuana to Peter Young about one month earlier [R. T. p. 86, lines 6-21]. In this connection, appellant's explanation that he was only bragging should not even be considered on appeal. This rather feeble excuse was brought out during the trial when appellant Mejia was on the stand [R. T. pp. 274-275, 281-282], and the jury chose not to believe him, but rather to believe the Government's witnesses. In this connection, and generally in considering appellant's arguments, it should be noted that authority is unanimous that the evidence should be considered in a light most favorable to the government when the case is before an appellate court. (*Arena v. United States,* 226 F. 2d 227 (9th Cir., 1955), *cert. den.*, 350 U. S. 954; *Woodard Laboratories v. United States,* 198 F. 2d 995, 998 (9th Cir., 1952); *O'Leary v. United States,* 160 F. 2d 333 (9th Cir., 1947)). As the court put it in *Woodard Laboratories v. United States, supra:*

> "The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government." (198 F. 2d 995, 998).

With this rule in mind, it is well to note that appellant has brought in his *own* evidence concerning the admissions made by Mejia to Deputy Burley (Ap. Br. p. 12, lines 12-13), has brought up material adduced on cross-examination (Ap. Br. p. 10, line 22, to p. 11, line 3), and has generally raised questions as to credibility and weight which the jury has already resolved in favor of the government. All this the appellant did after stating that

consideration would apparently be limited to the government's case (Ap. Br. p. 7, lines 22-26).

This rule, as paraphrased in the *Woodard* case, *supra,* presupposes that there was some substantial evidence upon which the verdict is based. In the instant case, it can scarcely be doubted that there was such substantial and competent evidence to connect Mejia with the events of February 20, 1957. As defined in *Woodard Laboratories v. United States, supra,* at 998

> "Substantial evidence is . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The conclusion that Mejia was involved in the transportation and sale of marijuana on February 20, 1957 seems quite logical in view of the facts that he was seen driving near Young's house, picking up Young's companion, and delivering a cardboard box later proved to contain marijuana to Young's house. Even if the government were to concede, as it does not, that some of the evidence is as consistent with innocence as with guilt, that would not be determinative of the weight of the evidence. (*Woodard Laboratories v. United States supra; Schino v. United States,* 209 F. 2d 67 (9th Cir., 1953); *Stoppelli v. United States,* 183 F. 2d 391 (9th Cir., 1950) *cert. den.,* 340 U. S. 864, *reh. den.* 340 U. S. 898). In *Schino v. United States, supra,* the language was emphatic when the court said:

> ". . . The theory . . . that in a circumstantial evidence case a conviction cannot be supported if the evidence is as consistent with innocence

as with guilt, has been laid to rest by the Remmer case, at least where, as here, the question arises on a motion for judgment of acquittal." (209 F. 2d 67, 72).

Appellant's contentions regarding the credibility of testimony adduced at the trial are not well taken, either. If evidence is found to be substantial, the role of the appellate court is at an end, because questions of credibility are for the trial court. (*Bryson v. United States,* 238 F. 2d 657 (9th Cir., 1956); *C-O-Two Fire Equipment Company v. United States,* 197 F. 2d 489 (9th Cir., 1952); *Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (9th Cir., 1948)). Thus, the questions appellant raises as to the length of time it took the officers to arrest Mejia (Ap. Br. p. 11, lines 12-16), and the alleged failure of Officers Burley and Farrington to recognize appellant on the day he was arrested, were questions of credibility which the jury resolved in favor of the prosecution. It must also be pointed out that the allegations that Mejia walked past Officers Burley and Farrington and that they did not recognize him were staunchly denied by these officers [R. Tr. p. 112, lines 19-22; p. 183, line 21, to p. 184, line 10]. Appellant failed to mention this fact in his brief.

Appellant's contention that no inference of guilt can be drawn from Mejia's ownership of the automobile used in the transportation of narcotics on February 20, 1957 is hardly worth the trouble of argument since not

only the automobile, but also Mejia, was identified positively at the scene of the crime.

Under the state of the law the evidence in this case amply supports the conviction of appellant Mejia.

## Conclusion.

1. The consolidation of Appellant Mejia's indictment with that of Peter Young was authorized by Rules 13 and 8(b) of the Federal Rules of Criminal Procedure, since the offenses charged grew out of the same factual transaction.

2. The fact that Peter Young was charged with three more offenses than appellant Mejia cannot be used to predicate error as to the trial court's order to consolidate the indictments, since Rule 8(b) authorizes such procedure.

3. There was little chance that appellant Mejia was prejudiced since the number of offenses involved was small and there were only two defendants. Thus, the possibility of confusion was negligible.

4. Consolidation of indictments is generally considered to be within the sound discretion of the trial court.

5. Appellant Mejia was protected by the trial court's admonitions and instructions to the jury to consider his case separately from Young's and not to use evidence in the Young case against Mejia. Appellant was therefore not prejudiced.

6. On an appeal from a conviction, the evidence must be viewed in a light most favorable to the government.

7. The evidence against appellant was of sufficient substantiality and competency to sustain the conviction.

8. Questions of credibility were for the trial court and were resolved against appellant Mejia.

Wherefore, the government prays that the judgment be affirmed.

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